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Kodo Construction, Inc. and Washington and Northern Idaho District Council of Laborers. Case 19–CA–159674

October 29, 2018

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS KAPLAN
AND EMANUEL

The General Counsel seeks a default judgment in this case on the ground that the Respondent has failed to file an answer to the complaint. Upon a charge and an amended charge filed by the Washington and Northern Idaho District Council of Laborers (the Union) on September 9 and November 25, 2015, respectively, the General Counsel issued a complaint on December 31, 2015, against Kodo Construction, Inc. (the Respondent), alleging that it has violated Section 8(a)(5) and (1) of the National Labor Relations Act. The Respondent failed to file an answer.

On February 2, 2016, the General Counsel filed a Motion for Default Judgment with the Board.¹ Thereafter, on February 4, 2016, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response. The allegations in the motion are therefore undisputed.

Ruling on Motion for Default Judgment

Section 102.20 of the Board's Rules and Regulations provides that the allegations in a complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. In addition, the complaint affirmatively stated that, unless an answer was received by January 14, 2016, the Board may find, pursuant to a motion for default judgment, that the allegations in the complaint are true. Further, the undisputed allegations in the General Counsel's motion disclose that by letter dated January 21, 2016, the Region advised the Respondent that unless an answer was filed by January 28, 2016, a motion for default judgment would be filed. The Respondent again failed to file an answer.²

¹ On May 24, 2016, the General Counsel submitted a supplement to his motion for default judgment with information related to the service of documents in this case.

² The motion for default judgment indicates that the charge and amended charge were served by regular mail to the Respondent's mailing address. The motion for default judgment and the supplement to

In the absence of good cause being shown for the failure to file an answer, we deem the allegations in the complaint to be admitted as true, and we grant the General Counsel's Motion for Default Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent has been a Washington corporation with an office and place of business in Auburn, Washington (the facility) and has been engaged in the construction industry as a cement contractor.

During the 12 months preceding issuance of the complaint, the Respondent, in conducting its business operations, had gross revenues valued in excess of \$500,000.

During the 12 months preceding issuance of the complaint, the Respondent, in conducting its business operations, purchased and received goods at its facility valued in excess of \$50,000 directly from points outside the State of Washington.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

the motion indicate that the complaint was served by certified mail to the Respondent's mailing address. In addition, the motion for default judgment was served by mailing copies by regular mail to the Respondent's mailing address and also by electronic mail to the Respondent. There is no indication that any of these mailings sent to the Respondent were unclaimed or returned.

Subsequently, the complaint was resent by certified mail to the Respondent's mailing address, and tracking information provided by the U.S. Postal Service shows that document was unclaimed. The complaint and the motion for default judgment were then resent by certified mail to both the Respondent's street address and the Respondent's previous mailing address. In addition, the supplement to the motion for default judgment was sent by certified mail and regular mail to the Respondent's mailing address, street address, and previous mailing address and also by electronic mail. There is no indication that any of these mailings were unclaimed or returned. Moreover, at the time the General Counsel filed its motion for default judgment, the Washington Secretary of State website listed the Respondent's street address as the address for the Respondent's registered agent and the Respondent's mailing address as an additional address for the Respondent, and it still has the Respondent's registered agent as having the same street and mailing addresses previously listed for the Respondent.

It is well settled that a respondent's failure or refusal to accept certified mail or to provide for receiving appropriate service cannot serve to defeat the purposes of the Act. See *Cray Construction Group, LLC*, 341 NLRB 944, 944 fn. 5 (2004); *I.C.E. Electric, Inc.*, 339 NLRB 247, 247 fn. 2 (2003). Further, the failure of the postal service to return documents served by regular mail indicates actual receipt of those documents by the Respondent. *Id.*; *Lite Flight, Inc.*, 285 NLRB 649, 650 (1987), *enfd. sub nom. NLRB v. Sherman*, 843 F.2d 1392 (6th Cir. 1988).

II. ALLEGED UNFAIR LABOR PRACTICES

1. At all material times, Amine Ghedamsi has held the position of the Respondent's owner and president and has been a supervisor of the Respondent within the meaning of Section 2(11) and/or an agent of the Respondent within the meaning of Section 2(13) of the Act.

2. About June 1, 1983, the Respondent, an employer engaged in the building and construction industry, entered into a Laborers Compliance Agreement (the Compliance Agreement), which, at all material times, bound the Respondent to, among other agreements, the Western/Central Washington Master Labor Agreement (the Western/Central Master Agreement) between the Associated General Contractors of Washington and the Union.

3. By the Compliance Agreement and the Western/Central Master Agreement, the Respondent agreed to be bound to future Western/Central Master Agreements unless timely notice was given.

4. The employees of the Respondent identified in the Compliance Agreement (the unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

5. By entering into the Compliance Agreement, the Respondent recognized the Union as the limited exclusive collective-bargaining representative of the unit without regard to whether the Union's majority status had ever been established under Section 9(a) of the Act.³ Such recognition has been embodied in successive collective-bargaining agreements, the most recent of which is effective by its terms from June 1, 2015, through May 31, 2018.

6. Since about April 10, 2015, the Union has requested in writing that the Respondent furnish it with the following information:

(a) The total number of projects that your company is working on;

(b) The name, address, and total number of employees performing work under Article 2 of the Western/Central Washington Master Labor Agreement for each project;

(c) The name, address, and contact person [sic] for the General Contractor for each project; and

(d) The name, address, and contact information for each employee.

7. The information requested by the Union, as described above in paragraph 6, is necessary for, and relevant to, the Union's performance of its duties as the limited exclusive collective-bargaining representative of the unit.

8. Since about April 10, 2015, the Respondent has failed and refused to furnish the Union with the information it requested as described above in paragraph 6.

9. About June 1, 2015, the Respondent ceased to assign work to its unit employees.

10. About June 1, 2015, the Respondent ceased to obtain qualified applicants from the applicable local union office to perform unit work.

11. Since about June 1, 2015, the Respondent has failed and/or refused to continue in effect the terms and conditions of employment of the unit contained in the Western/Central Master Agreement effective from June 1, 2015, through May 31, 2018, to which it is signatory, by failing and/or refusing to make payments to the Western Washington Laborers-Employers Pension Trust.

12. The terms and conditions of employment, as described above in paragraphs 9–11, are mandatory subjects for the purposes of collective bargaining.

13. The Respondent engaged in the conduct, as described above in paragraphs 9–11, without providing the Union with notice and/or an opportunity to bargain over such subjects.⁴

14. Since about June 16, 2015, the Respondent has repudiated its collective-bargaining relationship, the Compliance Agreement, and the Western/Central Master Agreement with the Union.

CONCLUSION OF LAW

By the conduct described above, the Respondent has been failing and refusing to bargain collectively and in good faith with the Union as the limited exclusive collective-bargaining representative of its unit employees with-

³ The complaint alleges that the Respondent is a construction industry employer and that it granted recognition to the Union without regard to whether the Union had established majority status. Accordingly, we find that the relationship was entered into pursuant to Sec. 8(f) of the Act and that the Union is therefore the limited 9(a) representative of the unit employees for the period covered by the contract. See, e.g., *A.S.B. Cloture, Ltd.*, 313 NLRB 1012, 1012 fn. 2 (1994), citing *Electri-Tech, Inc.*, 306 NLRB 707, 707 fn. 2 (1992), and *John Deklewa & Sons*, 282 NLRB 1375 (1987), enf'd. sub nom. *Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988).

⁴ The complaint alleges that the Respondent unlawfully made changes in terms and conditions of employment without affording the Union notice and an opportunity to bargain. We note, however, that changes in contractual terms and conditions during the term of the collective-bargaining agreement, such as the discontinuation of payments to the Pension Trust, require the consent of the Union. See, e.g., *Columbus Show Case Co. d/b/a CSC Worldwide*, 362 NLRB No. 765, 766 (2015); *GDT Electrical, Inc. d/b/a Gardner Electrical Corp.*, 356 NLRB No. 154, slip op. at 3 (2011) (not reported in Board volumes). This discrepancy in the complaint has no effect on our decision here, however, because the Respondent failed to satisfy even the less demanding standard.

in the meaning of Section 8(d) of the Act and in violation of Section 8(a)(5) and (1) of the Act. The Respondent's unfair labor practices described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent violated Section 8(a)(5) and (1) by failing and refusing to furnish the Union with relevant and necessary information requested on April 10, 2015, we shall order the Respondent to provide the Union with the requested information.

Further, having found that the Respondent violated Section 8(a)(5) and (1) of the Act by ceasing to assign work to its unit employees and to obtain qualified applicants from the applicable local union office to perform work, we shall order the Respondent to rescind those actions.

We shall also order the Respondent to make unit employees and hiring hall applicants whole for any loss of earnings and other benefits they may have suffered as a result of the Respondent's unlawful conduct. Backpay shall be computed in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In accordance with *King Soopers, Inc.*, 364 NLRB No. 93 (2016), enfd. in relevant part 859 F.3d 23 (D.C. Cir. 2017), we shall also order the Respondent to compensate affected unit employees and applicants for their search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.

We shall also order the Respondent to compensate unit employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards and file with the Regional Director for Region 19, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee, in accordance with *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016).

Having found that the Respondent violated Section 8(a)(5) and (1) by failing to remit contributions to the Western Washington Laborers-Employers Pension Trust

on behalf of unit employees since about June 1, 2015, as required by the Western/Central Master Agreement, we shall order the Respondent to make whole its unit employees by making all such delinquent fund contributions on behalf of unit employees that have not been made since that date, including any additional amounts due the funds in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979). Further, the Respondent shall be required to reimburse unit employees for any expenses ensuing from its failure to make the required fund contributions, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891, 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981). Such amounts are to be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.⁵

Additionally, we shall order the Respondent to rescind the actions taken that have been found herein to constitute repudiation of the Compliance Agreement and the Western/Central Master Agreement, to recognize and bargain in good faith with the Union as the limited exclusive collective-bargaining representative of the employees in the unit, and to give full force and effect to the terms and conditions of employment provided in the Compliance Agreement and the Western/Central Master Agreement effective from June 1, 2015, through May 31, 2018, and any automatic extensions thereof.

ORDER

The National Labor Relations Board orders that the Respondent, Kodo Construction, Inc., Auburn, Washington, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with the Washington and Northern Idaho District Council of Laborers (the Union) by failing and refusing to furnish it with requested information that is relevant and necessary to the Union's performance of its functions as the limited exclusive collective-bargaining representative of the Respondent's unit employees.

(b) Changing the terms and conditions of employment of its unit employees by ceasing to assign work to unit employees and to obtain qualified applicants from the applicable local union office to perform unit work.

⁵ To the extent that an employee has made personal contributions to a fund that are accepted by the fund in lieu of the Respondent's delinquent contributions, during the period of delinquency, the Respondent will reimburse the employee, but the amount of such reimbursement will constitute a setoff to the amount that the Respondent otherwise owes the fund.

(c) Failing and refusing to continue in effect the terms and conditions of employment of its unit employees contained in the Laborers Compliance Agreement (the Compliance Agreement) and the Western/Central Washington Master Labor Agreement (the Western/Central Master Agreement) effective from June 1, 2015, through May 31, 2018, to which it is signatory, and any automatic extensions thereof, by failing and/or refusing to make payments to the Western Washington Laborers-Employers Pension Trust.

(d) Repudiating its collective-bargaining relationship, the Compliance Agreement, and the Western/Central Master Agreement during the term of the Compliance Agreement and the Western/Central Washington Master Labor Agreement effective from June 1, 2015, through May 31, 2018, and any automatic extensions thereof, with the Union.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Furnish to the Union in a timely manner the information requested by the Union since April 10, 2015.

(b) Rescind the changes in terms and conditions of employment for its unit employees that were implemented about June 1, 2015, and restore the terms and conditions of employment that were in effect before the Respondent made the changes, including assigning work to unit employees and obtaining qualified applicants from the applicable local union office to perform unit work.

(c) Within 14 days from the date of this Order, offer unit employees to whom the Respondent has failed and refused to offer work assignments since June 1, 2015, full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(d) Within 14 days of the date of this Order, offer reinstatement to qualified applicants who would have been referred to the Respondent for employment through the applicable local union office to perform unit work were it not for the Respondent's unlawful conduct without prejudice to their seniority or any other rights or privileges to which they would have been entitled.

(e) Make unit employees and applicants whole for any loss of earnings and other benefits suffered as a result of the unilateral changes in their terms and conditions of employment, in the manner set forth in the remedy section of this decision.

(f) Compensate affected employees for the adverse tax consequences, if any, of receiving a lump-sum backpay

award, and file with the Regional Director for Region 19, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

(g) Give full force and effect to the terms and conditions of employment provided in the Western/Central Master Agreement effective from June 1, 2015 through May 31, 2018, and any automatic extensions thereof, by making all required payments to the Western Washington Laborers-Employers Pension Trust that have not been made since about June 1, 2015, including any additional amounts due the fund, in the manner set forth in the remedy section of this decision.

(h) Recognize and bargain in good faith with the Union as the limited exclusive collective-bargaining representative of employees in the bargaining unit identified in the Compliance Agreement and the Western/Central Washington Master Agreement between the Associated General Contractors of Washington and the Union during the terms of the agreements, and any automatic extensions thereof.

(i) Rescind its repudiation of the Compliance Agreement and the Western/Central Washington Master Agreement effective from June 1, 2015, through May 31, 2018, and give full force and effect to the terms and conditions of employment provided in those agreements during the terms of the agreements, and any automatic extensions thereof.

(j) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(k) Within 14 days after service by the Region, post at its Auburn, Washington facility copies of the attached notice marked "Appendix."⁶ Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper

⁶ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 10, 2015.

(l) Within 21 days after service by the Region, file with the Regional Director for Region 19 a sworn certification of a responsible official on a form provided by the Region attesting to the steps the Respondent has taken to comply.

Dated, Washington, D.C. October 29, 2018

John F. Ring, Chairman

Marvin E. Kaplan, Member

William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD
APPENDIX
NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to mail and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union;

Choose representatives to bargain with us on your behalf;

Act together with other employees for your benefit and protection;

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain collectively with the Washington and Northern Idaho District Council of Laborers (the Union) by failing and refusing to furnish it with requested information that is relevant and necessary to the Union's performance of its functions as the limited exclusive collective-bargaining representative of our unit employees.

WE WILL NOT change your terms and conditions of employment by ceasing to assign you work and to obtain qualified applicants from the applicable local union office to perform unit work.

WE WILL NOT fail and refuse to continue in effect the terms and conditions of employment contained in the Laborers Compliance Agreement and the Western/Central Washington Master Labor Agreement effective from June 1, 2015, through May 31, 2018, and any automatic extensions thereof, by failing and/or refusing to make payments to the Western Washington Laborers-Employers Pension Trust.

WE WILL NOT repudiate our collective-bargaining relationship, the Laborers Compliance Agreement, or the Western/Central Washington Master Labor Agreement during the term of the Compliance Agreement and the Western/Central Washington Master Labor Agreement effective from June 1, 2015, through May 31, 2018, and any automatic extensions thereof.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed by Section 7 of the Act.

WE WILL furnish to the Union in a timely manner the information requested by the Union since April 10, 2015.

WE WILL rescind the changes in the terms and conditions of employment for our unit employees that were unilaterally implemented about June 1, 2015, and restore the terms and conditions of employment that were in effect before the Respondent made the changes, including assigning work to unit employees and obtaining qualified applicants from the applicable local union office to perform unit work.

WE WILL, within 14 days from the date of the Board's Order, offer unit employees to whom we have failed and refused to offer work assignments since June 1, 2015, full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL, within 14 days from the date of the Board's Order, offer instatement to qualified applicants who would have been referred to us for employment through the applicable local union office to perform unit work were it not for our unlawful conduct, without prejudice to

their seniority or any other rights or privileges to which they would have been entitled.

WE WILL make unit employees and applicants whole for any loss of earnings and other benefits suffered as a result of the unilateral changes in their terms and conditions of employment, plus interest, less any net interim earnings, plus reasonable search-for-work and interim employment expenses.

WE WILL compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 19, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

WE WILL give full force and effect to the terms and conditions of employment provided in the Western/Central Washington Master Labor Agreement effective from June 1, 2015, through May 31, 2018, and any automatic extensions thereof, by making all required payments to the Western Washington Laborers-Employers Pension Trust that have not been made since about June 1, 2015, including any additional amounts due the fund.

WE WILL recognize and bargain in good faith with the Union as the limited exclusive collective-bargaining representative of our employees in the bargaining unit identified in the Laborers Compliance Agreement and the Western/Central Washington Master Labor Agreement between the Associated General Contractors of Washing-

ton and the Union during the terms of the agreements, and any automatic extensions thereof.

WE WILL rescind our repudiation of the Laborers Compliance Agreement and the Western/Central Washington Master Labor Agreement effective from June 1, 2015, through May 31, 2018, and give full force and effect to the terms and conditions of employment provided in those agreements during the terms of the agreements, and any automatic extensions thereof.

KODO CONSTRUCTION, INC.

The Board's decision can be found at <http://www.nlr.gov/case/19-CA-159674> or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

